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In The

Supreme Court of the United States

October Term, 1933.

No. 30.

FRANK E. COOPER, as Trustee in Bankruptcy of Wauchula Central Pharmacy, Inc., Bankrupt,
Petitioner,

v.

R. F. DASHER,
Respondent.

BRIEF OF R. F. DASHER IN SUPPORT OF PETITION FOR HABEAS CORPUS AND CERTIORARI *IN FORMA PAUPERIS.*

STATEMENT OF CASE.

The respondent, R. F. Dasher, turned over a large quantity of merchandise to the Referee claiming that they comprised all the goods belonging to the bankrupt corporation of which he was president. He claims that if the goods turned over had been appraised by appointees of the court the appraisal would have conclusively shown that he turned over all the goods that his book accounts indicated belonged to the estate. He com-

plains that all the goods of the bankrupt were inventoried and appraised at a low estimate by the employees of two creditor corporations who intentionally appraised them at a low figure for the purpose of purchasing them at a bargain price. That such was the appraisal that the Referee wrongfully relied upon to convict him of a shortgage rather than a legal appraisal by disinterested appraisers appointed by the court, when in truth and in fact there was no shortage. He complains further that the goods were all illegally sold and disposed of by the Trustee before the filing of the petition for the turnover order so that neither he nor anyone else could question the amount of goods received by the Trustee.

He claims that is the only reason for the purported shortage found by the Referee. He claims that the purported missing goods could not be described by the Referee in his order because in fact there were no missing goods; the discrepancy arising entirely from the unfair and illegal appraisal, made by parties who had not been appointed by the court, who were not under oath to make a fair appraisal, and who later bought practically all the goods at private sale from the Trustee at sixty (60%) per cent of their own appraisal.

He sets forth in his petition that he did not suspect or have notice of such irregular transactions on the part of the officials of the Bankruptcy Court until after his commitment. He, therefore, on December 1st, 1933, presented this matter for the first time before the District Court and that court refused to take cognizance of the matter. He, therefore, brings the same complaint and defense for the first time to this court on a direct proceeding.

I.

Appeal Still Pending.

The appeal of R. F. Dasher from a turn-over order issued by a Referee in Bankruptcy is the first direct appeal under Section 24-b of the Bankruptcy Act from such an order to reach this court. That appeal is still pending before this court on a petition for rehearing now filed.

Jurisdiction and procedure in connection with turn-over orders issued by inferior courts or tribunals is not statutorily fixed by law and the office of referee being somewhat in the nature of an administrative office rather than a court, we think in fairness to Mr. Dasher and to others who are likely to be placed in his predicament if this court does not ultimately sustain the decision of the Circuit Court of Appeals in the instant case, that some judicial check be made of the procedure adopted whereby the findings and conclusions of this Referee originated, not shown on the previous record before the Court of Appeals.

On other occasions this court has permitted the appellant to change and correct the record after the appeal reached this court. See, *Kennedy et al. v. Bank of the State of Georgia, 8 How. 587, at page 611; 12 L. Ed. 1209, 1219.* The respondent, Dasher, did not bring the appeal to this court and the record here is the one that the Trustee in Bankruptcy chose.

II.

Petition For Habeas Corpus and Certiorari Is a Form Of Appeal.

This petition directly to this court is not only fortified on account of the appeal now pending, but has authority as an original proceeding in the cases of *Ex parte, Buford, 3 Cranch. 448; 2 L. Ed. at page 496,* and *Ex parte, Commonwealth of Virginia, 100 U. S. 339, 25 L. Ed. 676.* We quote from the latter case as follows:

> "But the appellate power of this court is broader than its original and, generally, that is in most cases, it may be said that the issue of a writ of habeas corpus by us, when it is directed to one of our inferior courts, is an exercise of our appellate jurisdiction. Without going at large into a discussion of its extent, it is sufficient for the present to notice the fact that the exercise of the appellate power is not limited by the Constitution to any particular form or mode. It is not alone by appeal or writ of error that it may be invoked * * *.
>
> "In the latter of these cases it was said by Chief Justice Chase, in delivering the opinion of this court: 'We regard as established, upon principle and authority, that the appellate jurisdiction by habeas corpus extends to all cases of commitment by the judicial authority of the United States, not within any exception made by Congress' * * *.
>
> "We have then, an application to our appellate power over the action of a District Court, in a case where it is alleged that court has acted outside its jurisdiction * * *.
>
> "The bench warrant was an order of the court, and the validity of the bench warrant is the matter in question * * *.
>
> "And in *Ex parte Lange, 18 Wall. 163,* it was ruled, after an examination of authorities, that when a prisoner shows that he is held under a judgment

of a Federal court, given without authority of law, this court, by writs of habeas corpus and certiorari, will look into the record, so far as to ascertain whether that is a fact, and if it is found to be so, will discharge him."

III.

Complaint.

The petition here of R. F. Dasher is in substance that he turned over a great quantity of goods which consisted of all the merchandise of the bankrupt to the Receiver and Trustee in Bankruptcy on the date of his appointment. The Referee in Bankruptcy on the face of his turn-over order described the goods turned over "was of a value of $29,171.04." (See page 17 of Record here on appeal.)

The respondent, Dasher, complains that these goods described by the Referee were actually sold and disposed of at private sale by the Trustee and the sale confirmed by the Referee without ten (10) days' written notice to creditors as required by law and without having the goods admittedly turned over appraised by officers appointed by the court in accordance with Section 70-b of the Bankruptcy Act, long before the petition for the turn-over order was filed in the Referee's office.

Under those circumstances the dilemma in which Mr. Dasher was placed is obvious to this court. The only defense to the petition for the turn-over order was a legal inventory and appraisal as required by law, or to turn to the goods delivered and show the Bankruptcy Court that they comprised all the goods that accounting methods indicated should be in possession of the bank-

rupt corporation at the time of bankruptcy. But the goods had not been legally appraised and in addition they had been disposed of by the Trustee and Referee long before the respondent had notice that he was going to be compelled to prove that those goods turned over comprised all the goods. Mr. Dasher's only defense then had vanished by the hands of his accusers.

Indeed it is inconceivable that any procedure could be more cruel or unfair, even dishonest, toward the respondent. Using a classical expression "there is no judgment in their goings; they have made them crooked paths; whosoever goeth therein shall not know peace." *Isaiah 59:8.*

IV.

Was Appraisal Necessary Prerequisite To Adjudication That There Was a Shortage Of Goods?

The district judge has held, we believe in error, that this lack of appraisal by the Bankruptcy Court is a matter *in pais* attacking the turn-over order. In other words that court *sub silentio* says that it is all too bad for Mr. Dasher that the court first failed in its duty to obey the Bankruptcy Law, but that is Mr. Dasher's "hard luck." We take the stand that this failure to appraise the goods coupled with the private sale and disposal of the goods actually turned over, under the circumstances of this case, strikes at the jurisdiction of a referee to entertain such a turn-over proceeding.

No one can seriously contend that a referee in bankruptcy is a court of general jurisdiction even in bankruptcy matters. The administrative office of referee in

bankruptcy is not a court of record for none of its orders and decrees are enrolled, nor does it have a seal. It is a subsidiary of an inferior court and a very limited tribunal. Consequently there can be no legalistic presumptions concerning its jurisdiction applicable to courts of general jurisdiction.

> "But when no facts are present, or only such facts as have neither legal value nor color of legal value in the affair, then, in that event, for the magistrate to take jurisdiction is not, in any manner, the performance of a judicial act, but simply the commission of an official wrong." *Broom v. Douglas, 175 Ala. 268; 57 So. 860; 44 L. R. A. (N. S.) 164, page 176; Ann. Cas. 1914-C 1155.*

No better illustration of the point involved can be stated than that made by this court in the case of *Noble v. Union River Logging R. Company, 147 U. S. 164; 37 L. Ed. 123, at page 126.* Quoting from said case:

> "It is true that in every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such, for example, as the service of process within the state upon the defendant in a common law action; the seizure and possession of the *res* within the bailiwick in a proceeding *in rem*, a publication in strict accordance with the statute, where the property of an absent defendant is sought to be charged. So, if the court appoint an administrator of the estate of a living person, or, in a case where there is an executor capable of acting, or condemns as lawful prize a vessel that was never captured; or a court martial proceeds and sentences a person not in the military or naval service; or the Land Department issues a patent for land which has already been reserved or granted to another person, the act is not voidable merely, but void. In these and similar cases the

action of the court or officer fails for want of jurisdiction over the person or subject matter. The proceeding is a nullity, and its invalidity may be shown in a collateral proceeding.

There is, however, another class of facts which are termed quasi-jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. With respect to these facts, the finding of the court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties. Examples of these are the allegations and proof of the requisite diversity of citizenship, or the amount in controversy in a federal court, which, when found by such court, cannot be questioned collaterally; the existence and amount of the debt of a petitioning debtor in an involuntary bankruptcy; the fact that there is insufficient personal property to pay the debts of a decedent, when application is made to sell his real estate; the fact that one of the heirs of an estate had reached his majority, when the act provided that the estate should not be sold if all the heirs were minors; and others of a kindred nature, where the want of jurisdiction does not go to the subject matter or the parties, but to a preliminary fact necessary to be proven to authorize the court to act. Other cases of this description are (citations omitted)."

This court cited many other cases where a class of facts are necessary to be alleged and proved in order to set the machinery of the law in motion.

It may be erroneously insisted that the goods ordered turned over are not the same goods turned over and it makes no difference whether those goods were ever appraised or disposed of before the filing of the petition for the turn-over order.

That fallacy does not take into consideration that the undescribed goods ordered turned over are merely the difference or shortage between goods which the Referee ascertained from accounting methods should have been on hand and those which he said were turned over. Common sense as well as the face of the turn-over order itself is conclusive that this was the procedure adopted. Mathematically their reason is faulty for the Referee found a minuend of $49,495.81 by the book accounts, the subtrahend of $29,171.04 is alleged to have been arrived at by unauthorized means, therefore, the remainder of $19,167.66 was adjudicated without authority. The logic of the opposition before the District Judge presupposes a different state of facts, where no merchandise was turned over or found, and inquires whether under those circumstances appraisers must be first appointed to appraise nothing or the blue sky before setting the machinery of the law in motion to adjudicate that goods are missing. Applying mathematical reasoning to such a naive syllogism, we might say that under those circumstances simple addition would give the result or answer the same as the minuend in the present case. Under their hypothetical case no subtraction would be necessary for there would be nothing to subtract. That line of argument not only presupposes a different accounting problem but overlooks the simple arithmetical rule that subtraction is the reverse of addition. Every case stands on its own statement of facts and such an odious analogy is fallacious and wrong both in principle and application. However, they cannot escape the mandate of the law that the goods found must be appraised in the manner provided by Congress, and that is our complaint.

V.

Wilful Contempt Of Law By An Inferior Judge Or Magistrate Is Greater Than the Contempt Of a Citizen That Fails To Obey the Court In the Exercise Of Its Irregularity.

Among the six (6) classifications of contempt William Blackstone at page 284, Book IV of his Commentaries lists as the first and primary of all contempts "Those committed by inferior judges and magistrates; by acting unjustly, oppressively or irregularly." A litigant in contempt as a rule cannot proceed with litigation. Query: Should an inferior court proceed with litigation based in whole or in an essential part upon a premise arrived at and based upon a procedure not recognized by the law?

It would seem from the reported cases that in the face of the positive mandate of Section 70-b of the Bankruptcy Act, few Bankruptcy Courts, if any, have before this occasion, ever failed to abide by it, or to treat that portion of the act as a nonessential. Quoting the language of District Judge Archbald, in the case of *In re Gordon Supply & Mfg. Company, 133 Fed. (Pa.) 798:*

> "The Bankruptcy Act provides that all real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers, who shall be appointed by and report to the court. The manifest purpose of this is to secure for the benefit and *protection of all parties concerned* a designation and estimate of the property which passes into the hands of the trustee, and *for which in the first instance he is accountable.*" (Italics ours.)

If the Receiver and Trustee in Bankruptcy had failed or refused to account to the court for so large a quantity of the goods in his possession how could he, on his petition, compel the respondent to account for goods in his. For aught the court could well presume that the goods that were in the trustee's possession were the very goods he sought to compel the respondent to again produce. We cannot continue further in the realm of possibilities lest by our reasoning we should seem to accuse a trusted official of the court as the respondent is accused by a procedure unknown and forbidden by law. We are much in sympathy with those who honestly attempt to enforce the Bankruptcy Laws, and all laws, by legal means and orderly procedure.

VI.

Jurisdictional Facts.

Want of jurisdiction is a question that the court should consider whenever or however raised, even if the parties forbear to make it or consent that the case may be considered on its merits. *Metcalf v. Watertown, 128 U. S. 586, 32 L. Ed. 543.* We have already shown that this case has no counterpart in point of fact or procedure, or the lack of it, and if the goods subtracted were ascertained by the court through a method contrary to law the remainder of the proceeding is illegal and void.

But we rather anticipate a query to the effect that the record shows that the Referee's order was reviewed by the District Judge who issued the commitment for contempt complained of here; and is not the District Court a court of general and unlimited jurisdiction in Bankruptcy matters and every presumption of his jurisdiction, not affirmatively denied on the record, to be

indulged in by this court? That question was answered in the negative by Chief Justice Marshall in the case of *Ex parte Buford, 3 Cranch, 449, 453, 2 L. Ed. 495;* in the following language:

> "He observed that the Circuit Court did not reverse nor annul the original proceeding by the magistrates. It only diminished the sum in which bail should be required, and limited the duration to one year. It passed no new judgment but merely remanded the prisoner; it heard no evidence; it was not a proceeding *de novo;* it gave no judgment; it convicted the prisoner of no offense. He is, therefore, still detained under the authority of the warrant of the justices; and if that is defective, there is no just cause of detainer. But if the remanding by the circuit is to be considered as a new commitment, it is still a commitment upon the old ground; and if that was illegal, the order of the circuit court has not cured its illegality."

Perhaps the writer should refrain from the unpleasant duty of explaining the reasons why the purported appraisal was not only unauthorized by law and voided all proceedings based upon it including the private sale without notice as provided by Section 58 of the Bankruptcy Act. Those transactions, seemingly form a part of the scheme of things, purposely or inadvertently, whereby the respondent, Dasher, is made to atone. In fairness to counsel and to this court we state that our legal position in that regard coincides with every essential statement of fact found in the two reported cases of *In re Frazin & Oppenheim, 181 Fed. 309;* and *In re Lake Champlain Pulp & Paper Company, 20 Fed. (2nd) 425.* We regret to mention that such transactions can happen and the innocent be compelled to suffer for the guilty. Our purpose is to defend not to accuse.

VII.

Conclusion.

It is evading the question involved herein to assert that the jurisdiction of the Referee does not depend upon the correctness of his order. For in fact it is an order and not a final decree or judgment from which a general appeal will lie. Jurisdictional facts are those which condition the power of the courts to decide some of the issues in the case.

In addition to the many citations and examples of jurisdictional facts stated by this court in *Noble v. Union River Logging R. Company, supra,* we liken the absence of the appraisal before the turn-over order in the instant case to a final decree upon a creditor's bill before an action at law has been reduced to judgment; or the examination by a judgment creditor of a judgment debtor under the prevailing state statutory proceeding after judgment, before execution by the Sheriff is returned *nulla bona.* Without such prerequisite acts the proceeding is a nullity.

In closing it is stated without fear of contradiction that upon presenting the petition to be purged of contempt attached to the petition herein, the District Judge announced *ore tenus* that he was satisfied with Mr. Dasher's account of the specifically described goods referred to in the turn-over order and, using his own language, "If that was all of the order I would not keep him in jail a minute." If that part of the order should be urged as an excuse to deny this petition for habeas corpus and certiorari, it is enough to say that Mr. Dasher fully accounted for each and every item described. If the court did not accept his sworn statement he is still

deprived of his liberty unlawfully from the time the court refused to allow him to call witnesses to prove his newly arisen inability since the turn-over order to deliver them in compliance with the commitment. *Oriel v. Russel, 278 U. S. 358, 73 L. Ed. 419, 424.*

The office of Referee is only inaccurately called a court. It is the most limited in its jurisdiction of any other tribunal in the Federal Judicial System. Its jurisdiction over a subject matter and to enter a turn-over can be attacked for the lack of a jurisdictional fact such as an appraisal of the goods before declaring a shortage. There is nothing in *Oriel v. Russel, supra,* to the contrary.

This petition for a habeas corpus and certiorari should in favor of liberty be granted, especially since the petitioner sets up in his petition both to this court and the District Court that he relied upon the integrity of the Referee's court to such an extent that he did not suspect the nature of the purported appraisal as being other than an official appraisal in accordance with the provisions of the Bankruptcy Laws until and after he had been committed to jail on a turn-over order based upon a clandestine appraisal. The credulity and faith of the weak and the ignorant in our courts will be raised to a premium by the issuance of a writ of habeas corpus and certiorari in the instant case. There is no other form or means of appeal and the records of the Referee's court will disclose the truth or untruth of the petition filed herein on the return of the Writ of Certiorari.

The liberty of the respondent prisoner should be restored and the violence under the guise of legal form should not be condoned.

Respectfully submitted,

BURTON G. HENSON,
Solicitor for R. F. Dasher,
Respondent in Contempt.